91-363

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

OLD SECOND NATIONAL BANK, as Trustee under the provisions of a Trust Agreement known as Trust No. 2691; et al.,

Petitioners,

v.

CITY OF AURORA, a municipal corporation,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Petitioners were denied "just compensation" as required under the Fifth Amendment and "due process" and "equal protection" as provided under the Fourteenth Amendment (1) when they were denied the opportunity to testify as to the value of their property and (2) when the Trial court looked to Respondent City of Aurora's expert to tell the court what the law was under the Illinois Tax Increment Allocation Redevelopment Act ("Act").

2. Whether the Act is unconstitutional and therefore denies Petitioners "due process" as required under the Fourteenth Amendment because of vagueness.

3. Assuming arguendo that the Act is constitutional, whether, the Respondent, City of Aurora exceeded its authority to condemn private property for "public" purposes under the Act and violated the Fourteenth Amendment's proscription against taking of property without due process of law when it failed to prove compliance with the requirements of the Act.

PARTIES TO THE PROCEEDING

The other parties to this case not included in the caption are Maurice Howes, Mary Howes, Edith Haddleton, Margaret Price, Aurora Hotel-n-Inn, Chet Zema and June Zema.

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v.

CITY OF AURORA, a municipal corporation,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

PETITION FOR WRIT OF CERTIORARI

Maurice and Mary Howes, et al., respectfully petition for a Writ of Certiorari to review the judgment of the Appellate Court of Illinois, Second District, in this cause, review of which was denied by the Supreme Court of Illinois, affirming the condemnation by Respondent of Petitioners Maurice and Mary Howes.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second District No. 90-421 affirming the condemnation by the Respondent (App. A. infra) and the Order of the Supreme Court of Illinois denying Petitioners leave to appeal (App. B. infra) are not reported.

JURISDICTION

The Supreme Court of Illinois declined to grant Petitioners leave to appeal on June 5, 1991. There is no provision in Illinois practice for the filing of a Petition for Rehearing of such a decision by the Supreme Court of Illinois to deny leave to appeal.

The petition is being filed within 90 days of the Supreme Court of Illinois' order refusing leave to appeal, filed June 5, 1991. This Court has jurisdiction to review the Illinois Appellate Court's judgment by Writ of Certiorari pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the interpretation of the following provisions:

1. The Fourteenth Amendment to the United States Constitution, which provides, in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Fifth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, which provides in pertinent part:

> ". . . nor shall private property be taken for public use, without just compensation . . ."

STATEMENT OF FACTS

A. The Background of the Act.

The Tax Increment Allocation Redevelopment Act *Ill. Rev. Stat.* Ch. 24, Sections 11-74.4-1 to -11 (1979) ("Act") is an alternative method employed by municipalities to acquire funds to eradicate blighted conditions and provide for redevelopment without relying upon shrinking federal assistance or raising local taxes. The Act authorizes "tax increment financing" for redevelopment which is, in theory, a hoped for increase in tax revenue resulting from an increase in the assessed value of the redeveloped area. The tax increment is allocated to a special fund which may be used to pay for the redevelopment project or retire tax increment bonds.

Tax increment financing is unique because it requires the various taxing districts—schools, water and sewer, county, park district, et cetera, to allocate its tax increment to the municipality. Each taxing district within the redevelopment area, will continue to receive the property tax revenue based on the assessed property value *before* redevelopment. In addition, the property within the redevelopment project area is still taxed at the same rate and assessed in the same manner as the property in the remainder of the municipality.

Although tax increment financing does not violate uniformity in the collection of the revenue, it does alter the uniform distribution of the property tax revenue. In short, tax increment financing sets the amount of revenue distributed to the taxing districts at the "pre-redevelopment plan" level and allocates any taxes in excess of this amount back to the municipality.

B. The Background of the Taking.

The property sought to be condemned is an eight (8) floor, 60,000 square foot sound structure located on a 8,750 square foot parcel of riverfront land in downtown Aurora, Illinois. The structure which was built in 1917 is known as the Aurora Hotel and borders the Fox River.

In 1978, the Petitioners purchased the hotel for $490,000.00. At that time, between 70-100 rooms were occupied. In addition, the hotel's first floor, a commercial area, was in fair condition. Although the City posted the building as unfit for human habitation in 1979 due to lack of repair, maintenance and fire code violations, it did not force vacation of the premises. Again, in 1982, the city posted the hotel as unfit for habitation, citing heat and water problems. However, the Hotel successfully won a temporary restraining Order and the premises were not vacated. Thereafter, the City fire authorities inspected the hotel and it was cited for violations. The court upheld the State Fire Marshall's Order to close the building in September, 1984.

As a result, the hotel was unoccupied from September, 1984 to the valuation date, October, 1988.

C. The Decisions Below.

1. *Traverse Hearing*

The trial court received into evidence, four ordinances based upon the Act. Namely, Ordinance No. 86-5596 which approved the redevelopment plans and project (R 26) (Plaintiffs Exhibit #1); Ordinance No. 86-5597 which designated a portion of downtown Aurora a "Redevelopment Project" (R 27) (Plaintiffs Exhibit #2); Ordinance No. 86-5598 which adopted tax incremental allocation financing for the proj-

ect (R 27-28) (Plaintiffs Exhibit #3); and Ordinance No. 88-297 authorizing condemnation of the Defendants' property, (R 28) (Plaintiffs Exhibit #4). In addition, a copy of an Order entered in another case, over Defendants' objection, was also received into evidence (R 45-47) (Plaintiffs Exhibit #5).

At this juncture, the trial court found that the City made out a *prima facie* case pursuant to the Act, (R 48) despite lengthy objections by Defendants' counsel that the Ordinances introduced contained self serving recitals, were not supported by the facts which satisfied statutory criteria or the language contained in the cited Ordinances and the vagueness of the key provisions of the Act. (R 38-42; R 48-61).

Although the trial court rejected Defendants' vagueness challenge to the Act, the trial court proceeded, ironically, to rely upon Plaintiff's experts to state what the law was under the Act. (R 131-205). After the Traverse Hearing, the trial court requested further written argument and took the matter under advisement. (R 311-322). On September 20, 1989, the trial court entered its Order denying Defendants' Motion to Traverse. (R 364-365).

2. *Jury Trial*

On February 6, 1990, immediately prior to commencement of the jury trial, the trial court, over Defendants' objection, granted Plaintiff's *Motion in Limine* precluding Defendants from offering evidence or referring to the purchase price paid by them for the subject property, namely, approximately one-half million dollars. (R 341, 346, 356).

The Petitioner, Dr. Maurice Howes, a Ph.D. engineer at Illinois Institute of Technology, was allowed to testify

that in his opinion the hotel was worth $1,850,000.00. However, the court barred the underlying factors of his testimony. Specifically, the future occupancy and rental income if the hotel was a "Suites Hotel", a 1982 appraisal, a 1984 architect's valuation estimate and the $12.00/per square foot or $1,035,000.00 selling price of the Leland Hotel located across the street. (R 515).

After the jury heard the limited testimony allowed by the court and viewing the premises (that had not been occupied for four years, including, the preceding 1½ years due to the proposed taking), the jury returned a verdict of $129,000.00 or approximately $2.15 per square foot. (R 330-358; R 360-374; C 346-439, 444).

3. *Illinois Appellate Court and Illinois Supreme Court*

On March 1, 1991, the Illinois Appellate Court for the Second Judicial District affirmed the condemnation judgment for the Respondent, City of Aurora. Thereafter, the Petitioner filed a Petition for Leave to Appeal to the Illinois Supreme Court. On June 5, 1991 the Illinois Supreme Court denied the Petition without comment. (Appendix B).

REASONS FOR GRANTING THE WRIT

A.

THE JURY DID NOT DECIDE THE "FAIR MARKET VALUE" OF THE PROPERTY TAKEN THEREBY DENYING THE PETITIONER JUST COMPENSATION.

Just compensation as required under the Fifth Amendment is based upon not only principles of property law but also, basic equitable principles of fairness. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950). The guiding precept in a just compensation case is that the person whose property was "taken" be justly compensated pursuant to the language of the Fifth Amendment. In particular, "[t]he owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U.S. 369, 373 (1943). "Just compensation" is defined as "the full *monetary equivalence* of the property taken." *Almota Farmers E. & W. Co. v. United States*, 409 U.S. 470, 473 (1973). (emphasis added). Monetary equivalence is the "market value" and the owner is entitled to the "fair market value" of his property determined at the time of the taking. *Id.*

In the present case, the granting of the Respondent's *Motion in Limine* denied the Petitioners the opportunity to fully present their case. Therefore, the jurors did not hear all of the factors that would determine the "fair market value" and could not render a verdict that would provide Petitioners with just compensation.

The Illinois Appellate Court erred by not reversing the trial court's erroneous ruling to allow the *Motion in Limine*

which ignored the line of Illinois cases that do not preclude the owner from testifying to the purchase price strictly due to remoteness in time. *Metropolitan Sanitary District v. Industrial Development Corp.*, 121 Ill.App.2d 393, 257 N.E.2d 532, 535 (1970). The cost of the subject properties have been admitted despite a lapse of time since their purchase. *See, Department of Public Works & Buildings v. Bloomer*, 28 Ill.2d 267, 191 N.E.2d 245 (1963); *Department of Public Works & Buildings v. Gieseking*, 108 Ill.App.2d 105, 246 N.E.2d 707 (1969).

Moreover the Illinois Supreme Court has held the weight to be given such testimony is for the jury to decide in the light of all of the testimony. *Department of Conservation v. Aspengren Financial Corp.*, 72 Ill.2d 302, 381 N.E.2d 231 (1978).

The price the owner paid for his property is one of the most important pieces of evidence. Nichols, *Eminent Domain*, Sec. 21.2 (1975). Consistent with this Court's reasoning in *Almota Farmers E. & W. Co.*, at 479, the condemnee should surely not be put in a worse position. Therefore if a sale is too remote which would result in an inaccurate value, such testimony by the condemnor has not been allowed. In addition, if the market conditions increased the values since the purchase, testimony of a recent purchase will not be allowed to prejudice the compensation to the condemnee. *United States v. 69.67 Acres of Land*, 152 F. Supp. 441 (E.D. NY 1957).

In Petitioners' offer of proof, Dr. Howes established with respect to the prior sale and without contradictory evidence in the record at trial, that it was a voluntary arms-length transaction, that neither the condition of the property nor the market condition for the sale of hotels in Aurora had substantially changed since the purchase. (R 388, 987-998). The Respondent emphasized throughout

the trial that the property was not being operated as a hotel. However, the trial court denied the jurors the right to hear and consider the Petitioners' evidence. Namely, showing their plans for a suites hotel, thereby not only showing its highest and best use but also not leaving the jury with an unexplained characterization that the hotel had been closed for four years. (C 440).

To compound the prejudicial effect of excluding the prior sale prices of the Hotel and the foundation of Dr. Howes opinion of value, the trial court excluded evidence relating to a current appraisal and financing values of the Leland Hotel which was admittedly located across the street from the subject property. (See Plaintiffs Group Exhibit #1 for I.D.) But the court allowed Plaintiffs witness to discuss the Leland Hotel and characterize it as other than a "Hotel". (R 553). Excluding information from the jury's consideration as to value of a virtually adjacent property of the same type as the subject property which was relevant to show the reasonableness of the owner's valuation of the subject property improperly crippled the scope and credibility of Dr. Howes testimony.

The outrageously low verdict was the product of erroneous evidentiary rulings by the trial court. There can be no just compensation where the evidence is silent. In *United States v. Reynold*, 397 U.S. 14, 23-24 (1970) (Douglas, Black J., dissenting), this Court aptly stated:

> There are powerful forces loose in this country that deprecate the use of juries. The Department of Justice and other federal agencies often seem to dislike juries in condemnation cases. In my Circuit, juries have unexpectedly risen up in favor of homeowners and against Washington, D.C., and granted "just compensation" in large sums, in retaliation, it is believed, against hard-nosed officials who, with all the power of the central government, seek to plow them under. At other times the jury has acted differently and cut

> down the award. Juries in these condemnation cases perform, in other words, an historic restrain on both executive and judicial power. See Bushell's Case, 6 How St Tr 999, decided in 1670. (footnotes omitted).

There are two inconsistent standards operating in Eminent Domain proceedings in Illinois. First, the municipality is allowed to offer testimony as to the basis for its valuation. On the other hand, however, the owner is precluded from giving such testimony. This results in the jury hearing only the owner's naked assertion of value. Thus the owner's opinion is denied credibility and can only appear to the jury as a self-serving conclusion. This decision results in an unfair, unequal evidentiary process which renders illusory the protection afforded under the Fifth Amendment and the equal protection clause of the Fourteenth Amendment to Illinois property owners. In sum, there is no "just compensation" in Illinois.

B.

THE RESPONDENT'S CONFISCATORY ACTIONS WERE BASED UPON AN ACT WITH INDEFINITE AND VAGUE TERMS WHICH DENIED PETITIONERS THEIR DUE PROCESS RIGHTS.

It is impossible to determine with any reasonable degree of certainty what facts are necessary to satisfy the requirements of the Act. In particular, what constitutes a "Conservation Areas" as defined under the Act. *Ill. Rev. Stat.* Ch. 24, para. 11-74.4-3. Statutes cannot be vague and susceptible to different interpretations.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence

> a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked. (Footnotes omitted).
>
> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Similarly, in *City of Wheaton v. Sandberg*, ____ Ill. App. 3d ____, 574 N.E.2d 697 (2nd Dist. 1991), the Appellate Court found an ordinance allowing the City of Wheaton to condemn a parcel it determined was in need of redevelopment unconstitutionally unreasonable and vague. The court explained:

> Under the language of this ordinance, an owner of property, either wholly or partially vacant, cannot be certain whether the property is at risk of condemnation. The ordinance does not specify whether any vacancy is sufficient to justify the condemnation of the property, or whether the vacancy must be excessive, chronic or permanent. Due process requires the terms of the ordinance be clear enough so that every citizen of Wheaton may know how the ordinance will operate to affect their rights when it is utilized . . . Requiring the presence of only one of the . . . factors in order to justify condemnation is unreasonable, arbitrary and overly broad because it does not put the average person on notice as to exactly when the

> ordinance will be utilized . . . The ordinance does not bear a rational relationship to the legitimate governmental interest in redeveloping blighted areas. Accordingly, we find the ordinance to be inoperative and invalid.
>
> *Id.* at 702.

As noted, in order to be valid and pass constitutional scrutiny, all laws must be certain, definite and contain standards by which municipal authorities are controlled in their application of the ordinance to a property owner. *See, County of Lake v. First National Bank of Lake Forest*, 79 Ill. 2d 221, 402 N.E.2d 591 (1980). The rule of certainty and definiteness is identical and the rule that they must establish a clear rule or standard to operate uniformly and govern their administration, in order that arbitrariness and discrimination in administrative interpretation and application are avoided. Fundamentally it is based upon the lack of power in municipal authorities to delegate or re-delegate legislative powers. Those general statements of law are supported by the Illinois authorities. See generally *McQuillen Municipal Corporation*, Sections 25.59, 25.62 (3d Ed.).

It is submitted that the City of Aurora's confiscatory actions are unconstitutionally vague in many respects and baffled not only property owners but even the experts who testified in the Traverse Hearing as to how the law was to operate and be applied. In particular, the trial court resorted to Robert Teska's (Respondent's expert and the field surveyor of the subject Act study), subjective interpretation of the statute to reach its decisions. To illustrate, the court looked to Mr. Teska's subjective opinions regarding the many key terms of the statute, i.e., ". . . "dilapidation", "obsolescence", "deterioration", "excessive", "inadequate", "illegal use" or "deleterious" . . ."

although he virtually conceded no factual basis existed for the naked conclusions in his report. (R 306, 310-311).

Aurora's Ordinance No. 086-5596 which purports to make findings approving the Plan and Project (Plaintiff Exhibit 1) is devoid of findings of specific fact. It merely concludes in a circular reference to the Act that the City has "reviewed information . . ." and is "generally informed of the conditions in the proposed area" which cause such area to be a "conservation area" as defined in the Act; and that the City Council "has reviewed the Downtown Aurora Development Report" attached as Exhibit "D" to the Ordinance.

The Project Report prepared by Teska Associates, Inc. in a mere 45 pages, attempts to summarily review a 32 block area comprised of buildings. It is important to note, there is no mention of the Aurora Hotel.

In short, without an objective standard, where to draw the line becomes completely subjective and a function of caprice. For example, the propriety of the trial judge looking to the witnesses to tell him what an acceptable level of vacancies might be, etc. (R 290-291). The surveyors, the consultants, the City officials and the property owners, not to mention the court, were unable to determine the standard. It was prejudicial error for the trial court to allow the City's experts to fill in the statutory void by supplying their opinion for the definition and then to submit this "by-product" to the jury. A witness cannot supply omissions or remedy a defect in a law, depart from its plain meaning or substitute or insert new provisions since courts and witnesses have no legislative powers. It is not within the province of a court, nor for that matter a witness, to read into a law, language which would correct any supposed omission or defect or the question of statutory construction, application and meaning or to rewrite

a statute to improve it. *Badaracco v. C.I.R.*, 464 U.S. 386 (1984); *Sode v. United States*, 531 F.2d 531, 535 (1976) (Statute or regulation must not be construed to produce absurd results).

The Illinois Supreme Court in *Stofer v. Motor Vehicle Cas. Co.*, 68 Ill. 2d 361, 369 N.E.2d 875, 878 (1977), in addition to setting forth the criteria to determine the lawful delegation of legislative authority, emphasized the following:

> The demands of administrative efficiency are not dispositive of the mandate of our constitution. A structure which enables government to serve its citizens more efficiently also *may enable it to oppress them more efficiently.* The separation of powers and branches of government mandates a distribution of authority which may, on occasion, impede one of the branches in attempting to address a particular problem. This impediment is necessary, however, to impede the abuse of power by any one particular branch acting alone. (emphasis added).

Although the Illinois Supreme Court has found the Act constitutional on its face, the specific provisions of the Act that attempt to guide municipalities are unconstitutionally vague and indefinite. *People ex rel. Canton v. Crouch*, 79 Ill. 2d 356, 403 N.E.2d 242, 250 (1980). In sum, there is no objective standard to guide municipalities and protect the citizens of the State of Illinois. The citizens of Illinois do not know how the Act will affect them when it is utilized by the various municipalities in the State.

CONCLUSION

For all of the reasons stated above, the Petitioners, MAURICE and MARY HOWES, and AURORA HOTEL-N-INN COMPANY, respectfully pray that this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

[This Order Is Not Precedential
And Is Not To Be Cited]

**Opinion Of The Appellate Court
Of Illinois — Second District
No. 2-90-0421 — Filed March 1, 1991**

THE CITY OF AURORA, a Municipal Corporation,

Plaintiff-Appellee,

v.

OLD SECOND NATIONAL BANK, as Trustee under Trust Agreement known as Trust No. 2691, MAURICE HOWES, MARY HOWES, EDITH HADDLETON, MARGARET PRICE, AURORA HOTEL-N-INN, CHET ZEMA, and JUNE ZEMA,

Defendants-Appellants.

Appeal from the Circuit Court of Kane County.
No. 88-ED-0019
The Honorable Melvin E. Dunn, Judge Presiding.

ORDER

The defendants Maurice Howes, *et al.*, appeal from a condemnation judgment for the plaintiff, City of Aurora (the city). We affirm.

In October 1988, the city sought to condemn a 60,000 square foot downtown Aurora property on the Fox River,

known as the Aurora Hotel (the hotel). That condemnation was in connection with a development project under the Tax Increment Allocation Redevelopment Act (TIF) (Ill. Rev. Stat. 1989, ch. 24, par. 11-74.4-1, *et seq.*). The defendants are parties claiming an ownership interest in the hotel.

The court held a full hearing and then denied the defendants' traverse motion and motion to dismiss and granted the city's motion *in limine* to bar evidence of the 1975 and 1978 purchase prices of the hotel. Thereafter, at the jury trial the jurors viewed the premises. They also heard testimony that the hotel was constructed in 1917 and that in 1978, between 70 and 100 rooms had been occupied. The property was then in reasonable operating condition. In December 1979, the city posted the building as unfit for human habitation because of lack of maintenance, disrepair, and fire code violations; it did not however, force vacation of the premises.

In January 1982, the city again posted the hotel as unfit for habitation, citing heat and water problems. The hotel successfully won a temporary restraining order against the posting and was not vacated. Thereafter, the city fire authorities and State Fire Marshall inspected the hotel and found seven violations. In September 1984, the court upheld the State Fire Marshall's order to close the building. From September 1984 until the October 24, 1988, valuation date, the hotel was unoccupied.

The uncontested evidence included that while the hotel's first floor, a commercial area, was in fair condition, many toilets and sinks had been removed from the residential portion of the hotel. It also included that the hotel had exposed wiring, dead pigeons and mice inside, and an inadequate drainage system. The testimony also addressed the area surrounding the hotel.

The city's lead witness at the trial was real estate appraiser Ted Tadrowski. Mr. Tadrowski had been an appraiser since 1956 and had experience appraising for property owners and within the city of Aurora. Tadrowski noted the hotel's structural problems, and opined that downtown Aurora lacked sufficient demand to support a hotel. He considered five comparable sales and opined that the hotel's fair market value on the valuation date was $75,000. According to him, $2,040,000 would need to be spent to make the hotel usable as a rooming house.

Also testifying for the city was accountant John Kleb. Kleb owns a two-thirds interest in the trust which owns the Aurora Business Center, a five-story building about one block downriver from the hotel. That building had been vacant three years when it was purchased for $100,000 in May 1986; it was upgraded and reoccupied 30 days after its purchase.

Terrence Veller, a designated member of the Appraisal Institute of the American Institute of Real Estate Appraisers, testified to his broad experience in governmental and commercial appraising. Hotel and office buildings are his speciality. He opined that in October 1988, downtown Aurora was a low-demand site for a hotel and that the hotel's condition was poor. He estimated a cost of between $4.5 and $5 million, plus $12,000 to $15,000 per room in furnishings, to refurbish the hotel to its highest use, either as a suites hotel or as a full-service hotel. Mr. Veller considered those factors and recent sales of six other properties to determine that the hotel's fair cash market value at its highest and best use on the valuation date was $103,000.

The defendants' case began with Dr. Maurice Howes, one of the hotel-owner defendants. Dr. Howes was permitted to testify to his opinion that the hotel's value was

$1,850,000. However, the court barred his testimony regarding some factors underlying that opinion. Those factors included future occupancy and rental income if the hotel were a suites hotel, a 1982 appraisal, an architect's valuation estimate in 1984, and the neighboring Leland Hotel appraisal reported by the Leland's owner.

Also testifying for the defendant was Chet Zema, who had sold the hotel to Doctor Howes in 1978. Mr. Zema testified that he had owned several other hotels. He opined that for the hotel's highest and best use, it should be rehabilitated without changing its existing floor plan, at a cost of $1.5 million.

Mrs. Zema also testified. Her estimate of rehabilitation costs was $1.5 to $2 million; her estimate of the fair cash value of the property on the valuation date was $500,000.

The jury returned a verdict of $129,500 for the hotel's value as of the October 1988 valuation date. The defendants brought this appeal. The defendants' first argument on appeal is that the TIF statute (the Act), upon which this condemnation action is grounded, is unconstitutional. Despite the city's request that we strike the argument for insufficient presentation, we exercise our discretion to address it on the merits. See *Department of Conservation v. First National Bank* (1976), 36 Ill. App. 3d 495, 505.

The Act has a declared purpose of promoting the public good by instituting conservation measures and eliminating and redeveloping blighted municipal areas. (Ill. Rev. Stat. 1989, ch. 24, par. 11-74.4-2(b).) Under the Act, a municipality may designate an area as a "redevelopment project area" based on its containing "blighted" or "conservation" areas. (Ill. Rev. Stat. 1989, ch. 24, par. 11-74.4-3(p).) The Act defines a "conservation area" as:

> "any improved area within the boundaries of a redevelopment project area * * * in which 50% or more of the structures * * * have an age of 35 years or more. Such an area * * * [has] a combination of 3 or more of the following factors: dilapidation; obsolescence, deterioration; illegal use of individual structures; presence of structures below minimum code standards; abandonment; excessive vacancies; overcrowding of structures and community facilities; lack of ventilation, light or sanitary facilities; inadequate utilities; excessive land coverage; deleterious land use or layout; depreciation of physical maintenance; lack of community planning, is detrimental to the public * * * [and] may become a blighted area." Ill. Rev. Stat. 1989, ch. 24, par. 11-74.4-3(b).

The Act authorizes passage of local ordinances designating "conservation areas" and "redevelopment plans" for such areas. (Ill. Rev. Stat. 1989, ch. 24, par. 11-74.4-4(a).) Once a redevelopment plan is in effect, a municipality may, among other things, effectuate the purposes of the Act by exercise of eminent domain. (Ill. Rev. Stat. 1989, ch. 24, par. 11-74.4-4(c).) In this case, the city passed an ordinance designating a 32-block area including the hotel as a "conservation" and "redevelopment project" area. (Ill. Rev. Stat. 1989, ch. 24, par. 11-74.4-3(b), (p).) Another ordinance under the Act authorized condemnation of the hotel, finding that its acquisition was needed for the City of Aurora Downtown Plan established under the Act.

On appeal, the defendants first argue that the Act underlying this condemnation action is invalid because with its vague terminology, it unlawfully delegates legislative authority and cannot be understood by a man with ordinary reasonable intelligence.

In their argument, the defendants assert that the factors that section 11-74.4-3 lists to identify a "conserva-

tion area" are too broad and ambiguous to establish a standard by which to operate uniformly. They challenge the sufficiency of the city ordinances' findings of fact to support designation of the "conservation area" including the hotel. Also, they assert that the Act is invalid because it gives the city unbridled discretion to create a "conservation district" without satisfying any objective criteria.

The defendants correctly observe that a public body has only such eminent domain as are given by the legislature (see *Department of Public Works and Buildings v. Keller* (1975), 61 Ill. 2d 320, 324), and that eminent domain statutes must be strictly construed to protect land owners' property rights (see *City of Mt. Carmel v. Partee* (1979), 74 Ill. 2d 371, 378). Also, to pass constitutional scrutiny, a statute must contain definite standards for municipal authorities to apply. See *County of Lake v. First National Bank of Lake Forest* (1980), 79 Ill. 2d 221, 226.

Despite the accuracy of that basic law, we find no merit to the defendants' assertions that the Act's key terms such as "dilapidation," "obsolescence," "deterioration," "excessive," "inadequate," and "illegal use," are subjective and that persons of common intelligence cannot reasonably be expected to understand them. Whether an urban section is sufficiently decayed to be a threat to the public welfare is a matter for some subjective analysis. However, considering the Act's enumeration of factors to consider in that determination, we find no unconstitutional uncertainty.

The statute's key terms have a clear, ordinary meaning (see *Maloney v. Bower* (1986), 113 Ill. 2d 473, 479) and, as the supreme court already has found, the Act constitutionally identifies the harm to be prevented and a municipal-

ity's general means to prevent that harm. (*People ex rel. City of Canton v. Crouch* (1980), 79 Ill. 2d 356, 372-73).

The defendants also assert that there is an unconstitutional deficiency in the Act's failure to require that a determined percentage of the area's buildings or blocks demonstrate the "conservation area" factors. The supreme court has rejected such an argument; we find that it lacks all merit. See *City of Chicago v. Zwick Co.* (1963), 27 Ill. 2d 128, 134.

In a brief reference, the defendants also object to the Act's section 11-74.4-4(c) provision that a redevelopment area property may be acquired by eminent domain "in the manner and at such price as the municipality determines is reasonably necessary to achieve the objectives of the redevelopment plan and project." (Ill. Rev. Stat. 1989, ch. 24, par. 11-74.4-4(c).) More specifically, the defendants object that under this provision, the city could unilaterally decide the price for its land acquisitions under the Act, thereby depriving property owners of a *bona fide* offer of "just compensation."

The defendants offer no authority for their strained statutory construction and we find no merit to it. The plain language of the Act calls for the exercise of eminent domain. (See Ill. Rev. Stat. 1989, ch. 24, par. 11-74.4-4(c), *Maloney v. Bower*, 113 Ill. 2d at 479.) From a constitutional perspective we construe the plain language of section 11-74.4-4(c) to mean that the city may decide whether the expenditure of "just compensation" to acquire some property is "reasonably necessary" to the redevelopment plan. (*Rogue v. Quern* (1980), 90 Ill. App. 3d 1015, 1023.) With that construction, the provision in no way provides for the city's dictating a purchase price for land taken under the Act. Furthermore, in the eminent domain pro-

ceedings in this case, the defendants participated in a full jury trial to establish "just compensation" for the property to be taken; they have no basis to object to the possibility of taking without just compensation. See *People v. Rogers* (1989), 133 Ill. 2d 1, 15.

The defendants' second argument on appeal is that the city failed to meet the issues raised by their traverse motion and failed either to properly prove compliance with the Act's requirements or to refute the defendants' evidence. Consequently, according to the defendants, this exercise of eminent domain was improper. In somewhat rambling assertions, the defendants object that the city failed first to make out a *prima facia* case for condemnation prerequisites under the Act. They also challenge the necessity of the city's exercise of eminent domain in this case.

Where a defendant landowner contests in traverse the condemnation of his property, the petitioner bears the burden of demonstrating its right to condemn. (*Board of Education v. City of Chicago* (1949), 402 Ill. 291, 299.) However, where the legislature has authorized a municipality to exercise eminent domain, the municipality decides the necessity to exercise the right, and that decision is conclusive absent an abuse of the municipality's powers; a municipal ordinance or other resolution which finds a necessity of the exercise of eminent domain establishes a *prima facia* case which the defendant must then rebut with a showing of abuse of discretion. (*Trustees of Schools v. First National Bank of Blue Island* (1971), 49 Ill. 2d 408, 414.) Denial of traverse will not be disturbed unless it was against the manifest weight of the evidence. 49 Ill. 2d at 414.

In this case, the city introduced copies of its ordinances and the redevelopment plan passed under the Act. Those

items comprised findings that the designated area, an area that included the hotel, was a "conservation area" and subject to designation as a redevelopment project under the Act. The city ordinances also authorized the exercise of eminent domain based on the city's need to acquire certain properties, including the hotel, for the redevelopment plan.

At the traverse hearing, the defendants' first expert, Theodore Johnson, testified that as to the age of the property, deterioration, and the lack of utilities, the subject area qualified as a TIF area. However, he challenged the methodology of the city's expert Robert Teska, who had prepared a report on the area's TIF eligibility. Johnson also questioned Teska's findings of building code violations and vacancies. He had no opinion as to whether there existed a lack of community planning in the subject area. Mr. Johnson acknowledged that he had not viewed the subject area in 1986, when the ordinances were passed. Rather, he had reviewed the Teska TIF-eligibility report.

The defendants' second expert, real estate broker Randall Pros, testified that development would occur in the designated area without reliance on TIF. However, he also testified that government activity was necessary for redevelopment and that only the government engaged in downtown Aurora development in 1986.

In rebuttal, the city presented testimony of their expert, TIF-study preparer Robert Teska. Teska testified as to his experience with general urban development and his experience in preparing TIF reports. Specifically regarding the report prepared for this Aurora TIF district, Teska stated his on-site activities and the analysis he followed in finding TIF factors. Through his study, he had found the following statutory factors to support finding

of a "conservation area": buildings of a sufficient age, lack of planning, deleterious land use and layout, excessive vacancies, improper and inadequate utilities and roadways, and many buildings below code. Teska also testified about private disinvestment and other recent history in downtown Aurora. According to him, without public involvement, no private investment would occur in that area.

Having considered the record and the parties' arguments, we find no reason to disturb the trial court's denial of both traverse and dismissal motions for the defendants. With its ordinances, the city established a *prima facia* case both that all necessary statutory factors were present for creating the redevelopment area and that the exercise of eminent domain was necessary. See 49 Ill. 2d at 414.

Through introduction of its ordinances, the city sufficiently presented *prima facia* evidence that the area at issue was a "conservation area" and that prior to adopting a redevelopment plan the city had a basic timetable for and financial arrangements for the plan. It also demonstrated its finding that the redevelopment area had not had growth and probably would not have growth without the plan. The city also assured that the redevelopment plan conformed to the city's comprehensive development plan. (Ill. Rev. Stat. 1989, ch. 24, par. 11-74.4-3(n).) The necessity of the exercise of eminent domain in this area was also covered.

To attack that *prima facia* case, the defendants relied upon expert witnesses with conclusory analyses based on limited personal knowledge of the planned redevelopment area. In contrast to the detailed and responsive rebuttal testimony of Mr. Teska, the defendants' testimony challenging the contents of the Teska study was of limited persuasiveness. We find no reason to disturb the court's findings.

In response to the defendants' several side issues in connection with this argument, we make the following observations. The defendants complain that the redevelopment area at issue includes land parcels separated by the Fox River, in violation of the statutory requirement of contiguous parcels (Ill. Rev. Stat. 1989, ch. 24, par. 11-74.4-4(a)). We interpret section 11-74.4-4(a), as we must, in light of the whole Act's purpose. (See *Rogue v. Quern* (1980), 90 Ill. App. 3d 1015, 1023.) Based on that analysis, we find that the separation of area tracks by the River does not defeat this redevelopment area. The central Aurora area contained in the plan has been shown to be a unit of parcels that are contiguous "in a reasonably substantial physical sense" (see *Western National Bank v. Village of Keldeer* (1960), 19 Ill. 2d 342, 352), despite the presence of the Fox River in its interior.

Next, we find no merit to the defendants' assertion that the exercise of eminent domain is improper because there is vacant land within the redevelopment area. As the city notes, this objection is without merit because all the vacant land to which the defendants refer is subdivided property, and thus excluded from restrictions on the presence of vacant land in a development area. See Ill. Rev. Stat. 1989, ch. 24, par. 11-74.4-3(v).

Lastly, we respond to the defendants' assertion that the property here will develop without city action. The defendants presented no persuasive evidence of that view. In light of the evidence of both disinvestment in the area and the disintegration of the hotel, for example, we find no merit to this objection.

The defendant's third argument on appeal is that court reversibly erred in excluding certain evidence. Basically, the defendants assert that they were prejudiced by the

exclusion of evidence of prior sales of the hotel and exclusion of Dr. Howes' testimony on factors upon which he based his determination of the hotel's value. We will individually address the various claims.

In a condemnation suit the owner's purchase of the subject property is admissible if it was a voluntary transaction, current in time, and not marked by intervening, changed conditions or value fluctuations. (*Illinois State Toll Highway Authority v. Grand Mandarin Restaurant, Inc.* (1989), 189 Ill. App. 3d 355, 362.) The determination on admission of prior purchases is within the discretion of the trial court. See 189 Ill. App. 3d at 363.

Considering the circumstances here, we find no abuse of discretion in the court's exclusion of the 1978 purchase price. The evidence here showed that between 1978 and 1988, the hotel had gone from operating in basically sound condition to a significant debilitation; it had not operated commercially for four years prior to the valuation date. There was no countervailing testimony about substantial improvement of the commercial outlook in the area surrounding the hotel. Because of the ten-year period between the prior purchase and the valuation date, the substantial change in the hotel structure, and the testimony concerning the surrounding area, we do not find that the court abused its discretion in excluding this evidence.

We next consider the evidence that the defendants sought to introduce as the basis for Dr. Howes' opinion on the hotel's value. The defendants' argument is not clear to us, but it appears that they object to the court's refusal of testimony as to how past sales of the hotel, the projected costs of the hotel's reconstruction, and certain appraisals had been a basis for Dr. Howes' determination of the hotel's value. The defendants offer no authority

directly supporting admission of such evidence. Given Howes' interest in the property, the fact that he was not established as a qualified valuation expert, the uncertainty of the reconstruction and appraisal figures, and the remoteness of the prior sales, we find no abuse of discretion in this case. See *City of Chicago v. Anthony* (1990), 136 Ill. 2d 169, 185.

The defendants also object to the exclusion of both a report on the feasibility of developing the hotel into a suites hotel, their asserted "highest and best use" for the property, and appraisal and financing evidence related to the neighboring Leland Hotel. The city argues that these issues were waived as they were not presented in the defendants' post-trial motion. The defendants have not replied, and we agree with the city that any error has been waived. See 134 Ill. 2d R. 366(b)(2)(iii).

The defendants' final argument is that the city's complaint to condemn fails to state a cause of action. As the city points out, this issue was not raised in the trial court, either in the defendants' traverse motion, their motion to dismiss, or their post-trial motion. It is, consequently, waived. See 134 Ill. 2d R. 366(b)(2)(iii); *Village of Arlington Heights v. National Bank of Austin* (1977), 53 Ill. App. 3d 917, 919.

Based on the foregoing, we affirm the judgment of the circuit of Kane County.

Affirmed.

GEIGER, J. with BOWMAN and McLAREN, JJ., concurring.

APPENDIX B

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of May, 1991.

Present: Ben Miller, Chief Justice
Justice William G. Clark — Justice Thomas J. Moran
Justice Horace L. Calvo — Justice Michael A. Bilandic
Justice James D. Heiple — Justice Charles E. Freeman

On the fifth day of June, 1991, the Supreme Court entered the following judgment:

No. 71712

City of Aurora, a municipal corporation,

Respondent

v.

Old Second National Bank, as Trustee under the provisions of a Trust Agreement known as Trust No. 2691; Maurice Howes, Mary Howes, Edith Haddleton, Margaret Price, Aurora Hotel-N-Inn, Chet Zema and June Zema

# # # #

Maurice Howes, Mary Howes and Aurora Hotel-N-Inn,

Petitioners

Petition for Leave to Appeal from Appellate Court, Second District, Nos. 2-90-0421, EDKA880019

The Court having considered the Petition for Leave to Appeal and being fully advised of the premises, the Petition for Leave to Appeal is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this twenty-seventh day of June, 1991.

(Seal)

/s/ JULEANN HORNYAK, Clerk,
Supreme Court of the State of Illinois

APPENDIX C

IN THE CIRCUIT COURT
FOR THE 16th JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

No. ED 88 0019

CITY OF AURORA, a municipal corporation,

Plaintiff,

v.

OLD SECOND NATIONAL BANK, as Trustee under the provisions of a Trust Agreement known as Trust No. 2691; et al.,

Defendants.

ORDER
(Filed in Open Court on September 20, 1989)

THIS MATTER comes on for hearing on the Motions of the various Defendants to dismiss and traverse the various complaints for condemnation filed by the Plaintiff. Testimony was heard and evidence received.

The Court has reviewed and considered exhaustively the pleadings, evidence, memoranda and authorities presented.

Particular consideration is addressed to the expert testimony of Theodore Johnson and Robert Teska. The witnesses are directly opposed to each other. Credibility and reliability of method are issues.

The legislative history leading to the creation of the tax increment financing (TIF) district in question was carefully considered. Compliance with statutory requirements was examined. The resolutions of the city are presumed valid, but that presumption is rebuttable.

There was proper public notice and there were public meetings held wherein those seeking clarification of terms or procedures were free to attend and inquire. Ordinances were subsequently adopted by the governing body of the City of Aurora. Those ordinances were lawful. The TIF district was approved and created.

The city made its prima facie case and the statutory requirements giving rise to the exercise of the power of eminent domain are satisfied. Strict compliance has been accomplished.

The actions of the city and the necessity of the taking are amply supported by the evidence.

The Court adopts the foregoing as its findings and orders as follows:

The Defendant's Motion To Dismiss and Traverse is denied as to all defendants.

Enter this 20th day of September, 1989.

/s/ MELVIN E. DUNN
Judge

APPENDIX D

IN THE CIRCUIT COURT
FOR THE 16th JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

No. ED 88 0019

CITY OF AURORA, a municipal corporation,

Plaintiff,

v.

OLD SECOND NATIONAL BANK, as Trustee under the provisions of a Trust Agreement known as Trust No. 2691; et al.,

Defendants.

ORDER
(Filed in Open Court on February 6, 1990)

This cause coming to be heard on Plaintiff's *Motion in Limine* to exclude the purchase price of the subject property, arguments being heard by the court,

IT IS HEREBY ORDERED THAT:

Plaintiff's *Motion in Limine* is granted.

Date 2/6/90

/s/ MELVIN E. DUNN

APPENDIX E

VERDICT FORM
(Filed in Open Court on February 7, 1990)

We, the jury, find the just compensation to be paid the defendant for the taking of his property to be $129,500 One hundred twenty nine thousand and five hundred dollars

[Signatures of Jurors omitted in printing.]

/s/ MELVIN E. DUNN

APPENDIX F

IN THE CIRCUIT COURT
OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

No. ED 88 0019

CITY OF AURORA, a municipal corporation,

Plaintiff,

-vs-

OLD SECOND NATIONAL BANK, as Trustee under the provisions of a Trust Agreement known as Trust No. 2691; et al.,

Defendants.

JUDGMENT ORDER

(Filed in Open Court on February 28, 1990)

This cause coming on to be heard upon the complaint to condemn of the CITY OF AURORA, for the ascertainment of the just compensation to be made for the taking by said plaintiff of the fee simple title to the real property described in said complaint to condemn;

And the plaintiff appearing by RONALD R. MOSES, Corporation Counsel, and LEO N. CINQUINO and CELESTE P. CINQUINO of RIGHEIMER MARTIN & CINQUINO P.C.;

And the defendants, MAURICE HOWES, EDITH HADDLETON, MARGARET PRICE, MARY HOWES, AURORA HOTEL-N-INN COMPANY, appearing by their attorneys,

FRANK F. OWEN and ROBERT J. SCHILLERSTROM; and the defendant, THOMAS W. TANNER, appearing by his attorneys, JOHN W. GOSSELIN; and the defendants, OLD SECOND NATIONAL BANK, as Trustee under the provisions of a Trust Agreement known as Trust No. 2691, CHET ZEMA, and JUNE ZEMA, appearing by their attorneys, GERALD M. SHERIDAN, JR.; and the defendants, Carroll Properties, Inc., and Robert Carroll King, appearing by their attorneys, MICHAEL A. RIETER and LORI A. GOLDSTEIN of HOLLEB & COFF;

And it appearing to the court that all parties defendant herein have been served with process in the manner and form provided for by statute or have duly entered their appearances;

And the court having jurisdiction of all parties to this suit and the subject matter thereof, and all parties interested being before the court, and the court being fully advised in the premises, and having ordered that a trial be had as to the real property described in the complaint to condemn herein, it was ordered that a jury come, whereupon came the jurors of good and lawful men and women, who having been duly selected, examined and sworn, well and truly to ascertain and report the just compensation to be made to the owner or owners of and party or parties interested in the premises sought to be taken by these proceedings, and to each person interested therein, according to the facts in the case as they have been made to appear from the evidence, and having heard the evidence adduced herein, the arguments of counsel, and instructions from the court, bring in their verdict and say:

> "We, the jury, find the just compensation to be paid the defendants for the taking of the property to be:
>
> "ONE HUNDRED TWENTY-NINE THOUSAND FIVE HUNDRED DOLLARS ($129,500.00)".

And it appearing to the court that the real property referred to in the verdict is legally described in Exhibit A attached hereto;

Whereupon, judgment was entered on the jury verdict on February 7, 1990;

DOTH CONSIDER, ORDER AND ADJUDGE that the sums of money herein awarded by the jury in and by their verdict to the owner or owners of and party or parties interested in said real property described herein and in the complaint to condemn filed herein, is just compensation to the owner or owners thereof and party or parties interested therein for the taking by the plaintiff of the fee simple title to said real property described herein, and judgment is herein entered accordingly.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that plaintiff promptly deposit with the Treasurer of Kane County, Illinois, for the benefit of the owner or owners of and party or parties interested in the real property, the sum of ONE HUNDRED TWENTY-NINE THOUSAND FIVE HUNDRED DOLLARS ($129,500.00), as full compensation for the taking by the plaintiff of the fee simple title for the parcel described herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon proof being presented to the court that the plaintiff has deposited with the Treasurer of Kane County, Illinois, the said sum of ONE HUNDRED TWENTY-NINE THOUSAND FIVE HUNDRED DOLLARS ($129,500.00), judgment herein will be fully satisfied, and that plaintiff will be entitled to an order vesting title in plaintiff.

ENTER:

/s/ MELVIN E. DUNN
JUDGE

DATED: 2/28/90

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